MOTION FILED
MAR 16 2001

(H)

No. 00-1304

In The
Supreme Court of the United States
October Term, 2000

THE KROGER COMPANY,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*, AMERICAN BAKERS ASSOCIATION, IN SUPPORT OF THE PETITIONER

PETER A. SUSSER
Counsel of Record
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for *Amicus Curiae*

20 pp

No. 00-1304

In The
Supreme Court of the United States
October Term, 2000

THE KROGER COMPANY,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of this Court, the American Bakers Association ("ABA"), by its undersigned counsel, hereby moves for leave to file its brief as *amicus curiae* in support of the Petitioner, The Kroger Company.* In support of its Motion, the ABA states:

The ABA is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied member firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies

---

* Prior to filing this Motion, the ABA sought the consent of both parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to this request, however, the Respondents did not respond, necessitating this Motion.

produce approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

The ABA believes that its participation as *amicus curiae* will benefit the Court in this proceeding. The wholesale baking industry features a relatively high percentage of union representation in its workforce. While definitive statistics are not available, the ABA estimates that approximately 60-70 percent of the workers employed by its member companies are represented by labor organizations (most commonly, the Bakery, Confectionery, Tobacco Workers and Grain Millers Union, and the International Brotherhood of Teamsters). ABA members have experience in negotiating and implementing collective bargaining agreements. In certain instances, for any number of reasons, these contracts may *not* include a detailed definition of each term used, or they may utilize potentially inconsistent terms. In such circumstances, baking industry firms and the respective labor unions typically define ambiguous terms and resolve potential inconsistencies by establishing a mutually agreeable practice. Moreover, these baking companies and the labor organizations then typically follow these mutually agreeable practices for years without incident.

Thus, ABA members have first-hand familiarity with the manner in which employers and unions representing bakery industry employees fill in "gaps" in collective bargaining agreements and amicably resolve possible conflicts within collective bargaining agreements. They also have a national view of the manner in which challenges by a multi-employer fund to practices implemented by the parties to collective bargaining agreements – including those previously accepted by the fund – can and will have a

dramatic and adverse effect on the stability of labor-management relations in a broad range of industries.

WHEREFORE, the ABA respectfully requests that the Court grant its motion and permit its filing of the accompanying brief, *amicus curiae*, in support of the Petitioner.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for *Amicus Curiae*
American Bakers Association

March 16, 2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

INTRODUCTION & SUMMARY OF FACTS 4

ARGUMENT 7

I. CONSIDERATION OF THE PAST PRACTICES OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT IS CRUCIAL WHEN DETERMINING THE MEANING OF TERMS IN THE AGREEMENT 7

II. EXCLUDING EXTRINSIC EVIDENCE OF PAST PRACTICES UNDER COLLECTIVE BARGAINING AGREEMENTS IN SECTION 515 CASES WILL HAVE NEGATIVE CONSEQUENCES FOR EMPLOYEES AND EMPLOYERS 10

A. Employers Will Be Less Likely To Agree To Collective Bargaining Agreement Clauses Requiring Pension Contributions For Employees. 10

B. Alternate Staffing Strategies Are Utilized Widely Throughout the Economy, and the Parties' Adaptation to Such Trends and Options Should Be Recognized and Honored by Multi-Employer Plans. 11

C. The Appellate Court's Ruling Likely Will Lead to the Assertion of a Flood of Stale Claims. 13

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Auto Workers Locals 932, 1147, 107, 337 v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974) 8

Boise Cascade Corp. v. Steelworkers Local 7001, 588 F.2d 127 (5th Cir. 1979) 8

Brown-Graves Co. v. Central States, S.E. & S.W. Areas Pension Fund, 206 F.3d 680 (6th Cir. 2000) 9

Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co., 226 F.3d 903 (7th Cir. 2000) 6, 8

Old Colony Trust Co. v. City of Omaha, 230 U.S. 100 (1913) 7

Smith Steel Workers DALU 19806 v. A.O. Smith Corp., 626 F.2d 596 (7th Cir. 1980) 8

Steelworkers v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347 (1960) 7

Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc., 989 F.2d 132 (3d Cir. 1993) 9

OTHER AUTHORITIES

Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (1999) 11, 12

Frank Elkouri, *How Arbitration Works* (1997) 8

Pension Benefit Guaranty Corporation, *Pension Insurance Data Book 1999* (2000) 10

No. 00-1304

In The
Supreme Court of the United States
October Term, 2000

THE KROGER COMPANY

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF *AMICUS CURIAE*, AMERICAN BAKERS ASSOCIATION, IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS[1]

The American Bakers Association ("ABA") is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied member firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce

---

[1] The ABA hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part. In addition, no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

The ABA's members have extensive experience in negotiating and implementing collective bargaining agreements. A sizable percentage of baking industry employees are represented by labor unions, and many ABA-member companies have multiple collective bargaining agreements that cover different segments of their workforces. In some instances, for a variety of reasons, individual contracts may not include a detailed definition of each term used or they may utilize potentially inconsistent terms. In such circumstances, industry employers and the respective labor organizations define ambiguous terms and resolve potential inconsistencies by establishing mutually acceptable practices. Thus, the ABA and its members have first-hand familiarity with the manner in which employers and unions fill in "gaps" in collective bargaining agreements and amicably resolve possible conflicts in the day-to-day implementation of collective bargaining agreements. They also have a broad perspective on the impact of a multi-employer fund's effective "challenge" to the peaceful resolution of differences between parties to union contracts, such as is presented in this case.

The core question in this case is whether extrinsic evidence of the parties' course of performance under a collective bargaining agreement may be introduced to establish the meaning of the terms in the collective bargaining agreement. This case involves a multi-employer fund's challenge under Section 515 of ERISA to the employer's past practice of contributing to the fund on the ground that the employer's practice allegedly conflicts with the collective bargaining agreement. Of particular

importance in this case is the fact that the fund knew of and acquiesced to the employer's and union's interpretation of the contribution obligations for a period of 14 years. This issue is of great concern and direct relevance to all companies that are parties to collective bargaining agreements that require contributions to multi-employer pension funds. A great many members of the ABA are parties to such agreements, and – as is the case throughout the economy – there often are ambiguities in such contracts that regularly are resolved by the parties through mutual adjustment and resolution, and the adoption of a "practice" (as was done by Kroger and the union in this case) that the parties believe comports with their intent when they negotiated the applicable contract language read as a whole.

As such, the outcome of this case will have serious and far-reaching effects on employers throughout the country. If the decision of the U.S. Court of Appeals for the Seventh Circuit is not reversed, employers will face liability for pension fund contributions that they never agreed to make, that unions never requested, and that employees never expected. In addition, employers will face liability for the attorneys' fees and costs related to the Section 515 action to collect "delinquent" contributions. This situation will undoubtedly impact a large number of collective bargaining relationships, as employers likely will bargain for lower pension contributions to offset the potential risks and costs associated with collection actions like the one at issue in this case.

The decision of the U.S. Court of Appeals for the Seventh Circuit calls into question basic principles of contract interpretation and ignores critical aspects of the factual setting of this case. The parties to the collective bargaining agreement followed – for a period of 14 years – the contract interpretation that is the subject of the challenge initiated by the Central States, Southeast and Southwest Areas Pension Fund ("Fund") in the instant case. The Fund

had knowledge of the alleged conflict between the interpretation and the contract language during that period. The appellate court ignored the parties' course of performance when it decided that contributions were in fact owed for the casual employees at Kroger's Atlanta facility.

A definitive ruling from this Court on the issue of when extrinsic evidence of parties' course of performance under a collective bargaining agreement should be admissible to determine the meaning of its terms would be highly beneficial. It would provide critical and necessary guidance nationally to parties engaged in collective bargaining agreements in a host of settings. Consequently, the ABA and its member-companies have a keen interest in this Court's favorable action on the Petition for a Writ of Certiorari, to resolve questions that otherwise will face many parties in addition to the litigants directly interested in this proceeding.

INTRODUCTION & SUMMARY OF FACTS

For at least the past 30 years, Kroger and the International Brotherhood of Teamsters ("Teamsters") have negotiated and entered into collective bargaining agreements which cover Kroger's distribution center warehouse employees. Kroger and the Teamsters negotiate these agreements in two parts: a Master Agreement that contains terms and conditions applicable to all sites, and a Local Supplement that contains additional terms and conditions that apply only to a single site.

The Master Agreement defines three classifications of employees: (1) "regular" employees who have bid for a position and are on the regular seniority list; (2) "probationary" employees who have been hired on a trial basis, and who will be added to the regular seniority list after 30 working days or 60 calendar days of employment; and (3) "casual" employees who are hired on a short-term basis and

employed from time to time, and are not included on the regular seniority list. The Master Agreement requires Kroger to make pension contributions to the Fund for "regular" employees on the regular seniority list.

In 1977, Kroger and the Teamsters agreed that all new warehouse hires at the Atlanta distribution center would be classified as "casual" employees, not "probationary" employees, and informed the Fund of the agreement. New hires were notified that they would initially be classified as "casual" employees and consequently would not accrue seniority or be eligible for pension contributions until they were re-classified as "regular" employees. In addition, the applicable Local Supplement provided that "part-time" employees would become eligible for pension contributions after bidding on a regular, full-time position, completing 30 days of full-time employment, and being placed on the regular seniority list. Kroger made pension contributions to the Fund for all "regular" employees on the regular seniority list. Indeed, the Fund received monthly reports showing that contributions were not being made for the new hires until they became "regular" employees.

In 1991, the Teamsters and the Fund decided to challenge Kroger's practice of not making contributions for "casual" employees. The dispute between the Teamsters and Kroger was resolved at Step 3 of the grievance procedure established by the collective bargaining agreement. The Step 3 Committee denied the grievance, determining that employees who were not "regular employees" on the regular seniority list were not entitled to pension contributions based on the parties' course of performance under the collective bargaining agreement.

The Fund filed suit under Section 515 of ERISA, claiming that the new hires in Atlanta were "probationary" employees for whom Kroger should make contributions after

the 30th day of employment. The Fund prevailed in the lower court despite the fact that Kroger and the Teamsters had agreed for years that pension contributions would not be made for the employees at issue, the employees knew that they were not eligible for pension contributions, and the Fund had not objected to Kroger's practice for 14 years. *Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co.*, 226 F.3d 903 (7th Cir. 2000). In addition, the court ignored the fact that the dispute was resolved in favor of Kroger in the grievance proceeding.

The ABA respectfully submits that the U.S. Court of Appeals for the Seventh Circuit erred by failing to consider the extrinsic evidence of the parties' course of performance under the collective bargaining agreement when determining the meaning of the terms of the agreement. The impact of this ruling extends well beyond the grocery industry and warehouse employees involved in the instant dispute to virtually all industries and employees covered by collective bargaining agreements that require multi-employer pension contributions.

This Court's decision on the Petition will have serious consequences because the ability of employers, unions, multi-employer funds, and employees to rely on agreed upon pension contribution practices will be drastically undermined if the Petition is denied. Accordingly, the ABA urges this Court to grant the Petition for a Writ of Certiorari, and reverse the decision below.

ARGUMENT

I. CONSIDERATION OF THE PAST PRACTICES OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT IS CRUCIAL WHEN DETERMINING THE MEANING OF TERMS IN THE AGREEMENT.

Collective bargaining agreements are a unique type of contract because they usually are not drafted by lawyers and consequently tend to be less comprehensive in comparison to many other types of contracts. The "gaps" found in collective bargaining agreements, including gaps caused by ambiguity, often are filled in by a course of performance agreed to by the employer and the union. This procedure for filling in "gaps" has been utilized for years and is accepted by this Court, appellate courts, and arbitrators as a vital and integral component of collective bargaining agreement interpretation.

This Court has recognized that the manner in which the parties perform under a contract is a reliable indicator of the parties' intent when they entered into the contract. *See Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."). This Court also has recognized specifically the importance of past practice in interpreting collective bargaining agreements. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 1351-52 (1960) ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.").

Numerous appellate courts – including the U.S. Court of Appeals for the Seventh Circuit – have approved of arbitrators' consideration of past practice in interpreting collective bargaining agreements. *See, e.g., Smith Steel Workers DALU 19806 v. A.O. Smith Corp.*, 626 F.2d 596 (7th Cir. 1980); *Boise Cascade Corp. v. Steelworkers Local 7001*, 588 F.2d 127 (5th Cir. 1979); *Auto Workers Locals 932, 1147, 107, 337 v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974).

Arbitrators look to the parties' past practices to give meaning to ambiguous collective bargaining agreement language as a matter of course. *See* Frank Elkouri, *How Arbitration Works* 648 (1997) ("One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the custom or past practice of the parties."). In determining the weight to be accorded past practice, arbitrators consider a variety of factors including how well established the practice is, i.e. how many years the practice in question has been followed.

The U.S. Court of Appeals for the Seventh Circuit correctly stated that Section 515 prohibits an employer from relying on side agreements that have not been disclosed to the fund. 226 F.3d at 911. However, in this case, the practice of not making pension contributions for casual employees was not a side agreement nor was it unknown to the Fund. The extrinsic evidence of the parties' course of performance should have been considered for purposes of determining the meaning of the terms of the collective bargaining agreement in this case, especially since the contracting parties had finally resolved through the contractual grievance procedure any disputes related to their past practices or course of performance.

There is no good reason why extrinsic evidence of the parties' course of performance under a collective

bargaining agreement should be excluded from a Section 515 case, especially when the practice was known to the fund. In fact, some appellate courts have recognized that an employer should be allowed in a Section 515 case to show that a collective bargaining agreement term has an uncommon meaning using any extrinsic evidence known to the fund when the allegedly delinquent contributions accrued. *See, e.g., Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (allowing employer to introduce extrinsic evidence of past practice to establish meaning of "each employee" in collective bargaining agreement); *Brown-Graves Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 206 F.3d 680 (6th Cir. 2000).

Though cognizant of the special status accorded to pension funds as third-party beneficiaries of collective bargaining agreements, the ABA believes that extrinsic evidence should be considered when interpreting contribution clauses. The parties' course of performance under the collective bargaining agreement always has played a vital role in agreement interpretation because it is demonstrative of the parties' intent when they entered into the agreement. Such extrinsic evidence should be taken into account in all cases – including Section 515 cases – because it is the most reliable indicator of the intended meaning of ambiguous terms in a collective bargaining agreement.

II. EXCLUDING EXTRINSIC EVIDENCE OF PAST PRACTICES UNDER COLLECTIVE BARGAINING AGREEMENTS IN SECTION 515 CASES WILL HAVE NEGATIVE CONSEQUENCES FOR EMPLOYEES AND EMPLOYERS.

A. Employers Will Be Less Likely To Agree To Collective Bargaining Agreement Clauses Requiring Pension Contributions For Employees.

The appellate court decision in this case likely will cause employers to be reluctant to agree to collective bargaining agreement clauses requiring multi-employer pension contributions because of the increased chance that they will be held responsible for contributions that they did not agree to make.

Many employers throughout the country make pension contributions to multi-employer funds so that their employees will have financial support during retirement. According to the Pension Benefit Guaranty Corporation, there were approximately 9 million covered participants in multi-employer funds in 1999. *See* Pension Benefit Guaranty Corporation, *Pension Insurance Data Book 1999* 58 (2000). If employers believe that they will face liability for pension contributions for employees other than ones for whom contributions were agreed to in a collective bargaining agreement, it is predictable that such employers will be less likely to participate in such funds for the benefit of their employees.

The appellate court's exclusion of extrinsic evidence of the parties' practice under the collective bargaining agreement in this case would cause the employer to be held liable for pension contributions in excess of those to which it had agreed. This outcome will discourage employers from

agreeing to make multi-employer pension contributions for employees, and consequently will lead to increased financial instability for retired employees.

By contrast, permitting extrinsic evidence of past practice under a collective bargaining agreement to be considered when interpreting contractual pension contribution language in Section 515 cases will reinforce employers' willingness to make contributions to multi-employer funds, and may enhance employers' willingness to agree to other forms of retirement security for employees.[2]

B. Alternate Staffing Strategies Are Utilized Widely Throughout the Economy, and the Parties' Adaptation to Such Trends and Options Should Be Recognized and Honored by Multi-Employer Plans.

In the collective bargaining relationship that is at the core of this dispute, Kroger and the Teamsters arrived at certain agreed-upon practices to implement their contract as applied to differing categories of workers. In this regard, their actions implemented the full understanding of the contract's terms, and are worthy of complete consideration and weight. The practice at issue here, treatment of "casual" workers, is one commonly faced today by parties to collective bargaining relationships and in non-union operations.

The American workforce today features large numbers of workers who are engaged on a part-time basis, those who chose to work as "temporaries" for extended periods, people who work at home and/or those who

---

[2] According to the Bureau of Labor Statistics, approximately fifty percent of employees were eligible to participate in employer-provided pension plans in 1999. *See* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (1999).

"telecommute," individuals who work for leasing companies and are assigned to various customers, independent contractors and multiple other variations that differ from more traditionally-structured employment relationships. According to the Bureau of Labor Statistics, there were approximately 8.2 million independent contractors, 1.2 million temporary workers, and 2 million on-call workers in 1999. *See* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (1999). These and similar arrangements are utilized for multiple reasons that vary with the setting, and are sought by large numbers of employers and employees across the country.

In structuring their workforces and the conduct of their operations, unionized employers may find such arrangements to be desirable in certain circumstances, as do their non-union counterparts. For a variety of reasons, labor unions that represent the "traditional" workforce at such companies also may find it desirable to allow such flexibility at worksites in which they have an interest. In a great many of these cases, the collective bargaining agreements between the parties will not explicitly address all aspects of such staffing arrangements, but their use is resolved by the parties to the contract, either through mutual agreement and the establishment of accepted practice, or following the challenge of such alternatives under contractual grievance mechanisms.

Where the parties have developed such established "practices" that are known to interested multi-employer funds, those funds should not have the ability to disrupt such settled practices through a Section 515 action. Under the formulation of the U.S. Court of Appeals for the Seventh Circuit, not only may employers be less likely to employ workers in non-traditional arrangements (even though they and the union effectively may recognize and agree on the benefit or necessity of such action), but also their businesses

– and the continued employment and pension security of unit workers – may be jeopardized by the financial uncertainty that may result.

The logical – and nearly universally accepted – way to resolve disputes regarding ambiguous terms in a collective bargaining agreement is to consider the parties' course of performance under the agreement. Except when Congress has specifically mandated different treatment, there is no reason why a dispute regarding whether a collective bargaining agreement clause requires pension fund contributions for all employees or only particular categories of employees should be treated differently.

C. The Appellate Court's Ruling Likely Will Lead to the Assertion of a Flood of Stale Claims.

If the appellate court's decision is not reversed, there likely will be a rash of claims by funds against employers for allegedly delinquent contributions that accrued years ago. This would be unfair to employers who have spent countless hours negotiating collective bargaining agreements and then worked with unions to establish reasonable and fair practices to fill in the inevitable gaps in those agreements. To require employers to defend against such claims will waste management time and resources that could be better used addressing important workplace issues. Moreover, to require employers to defend against such claims and to prevent them from using their best evidence to justify their actions is simply unfair.

CONCLUSION

For the above-stated reasons, the ABA respectfully urges this Court to grant review of this matter. This action is necessary to determine whether the U.S. Court of Appeals for the Seventh Circuit erred in concluding that Kroger

should have made pension contributions for the employees at issue. The ruling below raises serious questions about the propriety and financial ramifications of practices adopted – through the agreement or acquiescence of the interested parties – throughout the economy.

This Court's granting of the Petition and its full consideration of the decision of the appellate court is necessary to resolve compelling questions that threaten to have an immediate and dramatic impact on long-standing interpretations of collective bargaining agreements across the nation.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, NW
Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for *Amicus Curiae*
American Bakers Association

March 16, 2001